August 20, 2018

Via Electronic Submission to: www.regulations.gov

Mr. Donald S. Clark
Secretary of the Commission
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Re: Public Comment for FTC Hearings on Competition and Consumer Protection in the 21st Century [Matter Number: P181201] [Docket No. FTC-2018-0048] [Topic #11]

Comments of the Consumer Advocacy & Protection Society (CAPS) at University of California, Berkeley, School of Law

Dear Mr. Clark:

The Consumer Advocacy and Protection Society ("CAPS") is a student-run organization dedicated to the promotion of consumer law and consumer protection at the University of California, Berkeley, School of Law. The Consumer Advocacy and Protection Society is pleased to submit this letter to the Federal Trade Commission ("FTC") in response to the Commission's upcoming Hearings on Competition and Consumer Protection in the 21st Century. Specifically, we submit this comment in response to Topic #11, or FTC Public Comment #761, which requests information about the "efficacy of the Commission's current use of its remedial authority."

In her July 18th Congressional testimony earlier this year, FTC Commissioner Rebecca Slaughter noted that "In addition to sufficient resources . . . sufficient authority is critical for the FTC to continue to meet the demands of the 21st century marketplace."[1] Commissioner Slaughter went on to explain that "civil penalty authority would [] go a long way to help the FTC better meet today's challenges as well as tomorrows."[2] We submit this comment to reiterate and emphasize that the efficacy of the Commission's remedial authority would be greatly enhanced by the addition of discretionary civil penalty authority against first-time Section 5 violations. The ability of the FTC to exercise discretion in levying civil penalties against certain first-time Section 5 violations is an essential tool in deterring unfair and deceptive business conduct.

I. Discretionary Civil Penalty Authority Against First-Time Section 5 Violations

The FTC should formally ask Congress to grant the Commission discretionary authority to levy civil penalties against first-time Section 5 violations.[3] Currently, the FTC cannot obtain civil penalties unless a company violates a pre-existing consent order or FTC rule, such as the Telemarketing Sales Rule. Therefore, when the FTC prosecutes first-time Section 5 violations it generally can only obtain injunctive relief and restitution.

As important as these remedies are, injunctive relief and restitution cannot provide adequate deterrence on their own unless coupled with discretionary civil penalty authority. In the

[1] U.S. House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection, *Federal Trade Commission Oversight*, at 43:39–43:58 (July 18, 2018), available at https://www.c-span.org/video/?448609-1/ftc-officials-testify-house-oversight-hearing.

[2] Id.

[3] Joan Z. Bernstein & Ann Malester, *Federal Trade Commission: Consumer Protection and Competition for a 21st-Century Economy*, in CHANGE FOR AMERICA: A PROGRESSIVE BLUEPRINT FOR THE 44TH PRESIDENT 421 (2009) ("The FTC's law enforcement efforts are [] sometimes thwarted by legal hurdles that make it hard for it to obtain monetary penalties from wrongdoers or those assisting wrongdoers. The agency should therefore consider seeking legislative authority to obtain civil penalties for violations of Section 5 . . . .").

words of FTC Chairman Joe Simons, "[I]f . . . we can only get an injunction that just says 'sin no more' then that is much less of a deterrent than if we could get monetary penalties that would actually cause the business to think through how it is conducting its business."[4] Moreover, as Commissioner Rohit Chopra explained during his recent Congressional testimony,[5] simply telling a business to stop an illegal practice once caught—without levying any monetary penalty other than reimbursing the wrongful gains—essentially leaves the business in nearly the same position it would have occupied had it never violated the law in the first place.[6] This not only creates insufficient deterrence against misconduct, but is also unfair to competitors who play by the rules.

The notion that injunctive relief and restitution alone can produce sufficient deterrence is predicated on a number of unwarranted assumptions: first, it assumes that the FTC identifies 100% of cases in which businesses commit Section 5 violations; second, it assumes that the FTC prosecutes 100% of those cases; third, it assumes that courts successfully find liability in 100% of cases where liability is proper; fourth, it assumes that the FTC can obtain a perfect remedy entailing 100% of the defendant's wrongful gain after liability is found.

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[4] U.S. House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection, *Federal Trade Commission Oversight*, at 1:01:41–1:02:25.

[5] U.S. House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection, *Federal Trade Commission Oversight*, at 1:06:00–1:06:38 (July 18, 2018) ("The question you're raising about whether on a first offense there should be penalties, I think that in order to deter misconduct, we need to consider when it's appropriate that even on a first offense the lack of penalties may not serve as adequate deterrence.").

[6] See cf James L. Thompson, *Citizen Suits and Civil Penalties under the Clean Water Act*, 85 MICH. L. REV. 1656–80, 1671 (1987) ("Permitting . . . civil penalties for past violations . . . induc[es] compliance by forcing the violator, before [violating], to consider the threat of quasi-punitive, economic sanctions."); James C. Lydon, *The Deterrent Effect of the Uniform Trade Secrets Act*, 69 J. PAT. & TRADEMARK OFF. SOC'Y 427 (1987) (finding that an inability to assess civil penalties against violators of trade laws "unduly favors a policy of unfettered competition at the expense of the legitimate state interest in deterring unethical commercial conduct.").

The problems with these assumptions are clear on their face. But even if all of these assumptions were true, taxpayers would still be essentially subsidizing corporate wrongdoing by publicly funding a consumer protection agency that can only seize precisely the amount of money earned illegally and not a penny more.[7]

The FTC should have the discretion to levy monetary penalties against certain first-time Section 5 offenders to promote deterrence. "[I]nadequate levels of sanctions are . . . a major matter for concern" in consumer protection law.[8] "Consumers rely upon public regulation to ensure that dangerous products do not reach the market, and this can only be done if a sufficient deterrent is available."[9] Allowing civil penalties may be the only way to effectively deter unfair and deceptive conduct in the marketplace.[10] Indeed, "the cost to sellers of ascertaining whether [a] particular[ly]" egregious practice could produce civil penalties "may deter them" from engaging in such dubious conduct in the first place.[11]

In fact, Chairman Simons noted in his Congressional testimony that civil penalty authority is crucial to creating deterrence against privacy and data protection violations.[12] However, there is no reason to restrict civil penalties solely to the privacy and data protection realm. Chairman

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[7] See Laura Nader, *Disputing without the Force of Law*, 88 YALE L.J. 998, 1001 (1979) ("The consumer suffers from a doubly disadvantaged position: he has to bear the full cost of legal fees, while businesses can deduct litigation costs as a business expense and the public bureaucracy's legal costs are ultimately paid by the consumer.").

[8] PETER CARTWRIGHT, CONSUMER PROTECTION AND THE CRIMINAL LAW: LAW, THEORY, AND POLICY IN THE UK 155 (2009).

[9] Id.

[10] See Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127 (2009) (discussing "the remedial functions of civil penalties," including: deterrence, compensation, and remediation).

[11] Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661–701, 688 (1977).

[12] U.S. House Energy and Commerce Subcommittee on Digital Commerce and Consumer Protection, *Federal Trade Commission Oversight*, at 46:40–46:55.

Simons supports civil penalty authority for privacy violations because of the difficulty the FTC faces in measuring consumer harm in privacy cases. But the FTC faces this same difficulty in many other contexts. For example, it can be difficult to prove injury and materiality in deception cases where consumers may have purchased the product for reasons unrelated to the claim being challenged.[13] But a deceptive claim about a product remains equally deceptive regardless of whether a consumer purchases the product for other reasons. Society has an inherent interest in deterring deceptive claims, and civil penalty authority would go a long way in fulfilling that interest.

The FTC should have broad discretionary authority to seek penalties against any Section 5 violation it deems worthy of civil penalties. This is not to suggest that the FTC should add on civil penalties to each and every Section 5 complaint. Rather, the FTC should have the *discretion* to seek civil penalties in certain cases involving egregious or intentional unfair or deceptive conduct.[14]

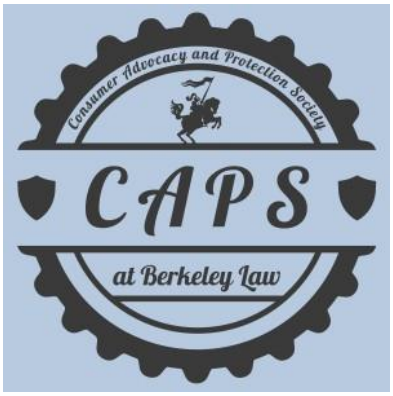
The use of punitive measures to create deterrence is far from a novel concept.[15] Indeed, state and international antitrust laws frequently include both criminal and civil penalty provisions

[13] Patricia Bailey & Michael Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AMER. U. L. REV. 849, 893 (1984) ("Typically, many preferences influence a consumer's decision to purchase a product or service with no single one being determinative. In many cases, especially in those involving advertising, it would be extremely difficult to establish that a particular misrepresentation caused consumers to choose differently, and even more difficult to show that they were 'injured' by the different choice."); Jeff I. Richards & Ivan L. Preston, *Proving and Disproving Materiality of Deceptive Advertising Claims*, 11(2) J. PUB. POL'Y & MARK. 45–56 (1992).

[14] Cf. James C. Lydon, *The Deterrent Effect of the Uniform Trade Secrets Act*, 69 J. PAT. & TRADEMARK OFF. Soc'y 427 (1987) ("Authorizing the discretionary imposition of such punitive sanctions . . . provides a proper balance among society's interests in deterrence of unethical business conduct [and] unfetterred legitimate competition . . . .").

[15] SEE GENERALLY PETER CARTWRIGHT, CONSUMER PROTECTION AND THE CRIMINAL LAW: LAW, THEORY, AND POLICY IN THE UK (2009) (discussing comparative approaches to using civil penalties and criminal prosecution to deter violations of trade laws).

as a means to deter future violations.[16] When considered in light of the criminal remedies available in antitrust law, the availability of civil penalties in the consumer protection context should be welcomed by industry as a reasonable compromise.



Sincerely,

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[16] Cf. Harry First, *The Case for Antitrust Civil Penalties*, 76 ANTITRUST L.J. 127, 132–41 (2009) (discussing the widespread use of civil penalties in international and state antitrust actions).